

**MIRIAM TAUBER LAW**

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**Via ECF**

Hon. Paul A. Engelmayer, U.S.D.J. (S.D.N.Y.)

**Re: *Avalon Holdings Corp. v. Gentile et. al.*, No. 18-cv-7291-VSB (S.D.N.Y.);  
& *New Concept Energy, Inc. v. Gentile, et. al.*, No. 18-cv-8896 (S.D.N.Y.)**

**Re: Opposition to Defendants' Request to File Sur-Reply**

Dear Judge Engelmayer:

*First*, I write on behalf of the Plaintiffs to respectfully request *nunc pro tunc* permission to file Plaintiffs' Reply Briefs approximately 3 hours past the midnight deadline. I apologize to the Court and the parties for any inconvenience.

*Second*, I write to oppose Defendants' request to put in a Sur-Reply.

Defendants should not be permitted to further distort the record by offering to "explain" the trading in a manner contrary to Gentile's testimony under oath.

In addressing Plaintiffs' excerpted example from the new trading records produced by the Defendants:

Account	Date Time	Type / Trade / Symbol	Shares	Price	Comm./Fee	Exec. Broker
MBS010067	7/24/2018 9:43:08	2 BUY AWX	800	\$2.218987	\$0.12	SURE
32810	7/24/2018 9:43:08	2 SELL AWX	800	\$2.218987	\$0	SURE
32812	7/24/2018 9:43:08	2 BUY AWX	300	\$2.2173	\$0	IB
32810	7/24/2018 9:43:08	2 BUY AWX	800	\$2.218987	\$0	SURE
32812	7/24/2018 9:43:08	2 BUY AWX	100	\$2.22	\$0	IB
32812	7/24/2018 9:43:08	2 BUY AWX	100	\$2.22	\$0	IB

Gentile's letter "explains" that: "The 800 shares identified by Plaintiffs were beneficially owned by a MintBroker client with 300 shares traded through ETC and 500 shares traded through Interactive Brokers."

This is contrary to Gentile's deposition testimony, discussing a similar (theoretical) example trade:

- A. **A customer wants to buy 5,000 shares of XYZ, and we principally executed against that order, then we can riskless principal trade it by going to the street at IB.**
- Q. In that situation, would you expect that<sup>[11]</sup><sub>SEP</sub> there would be two trades that would have been done, like, one against about the customer and one against -- to hedge it against --
- A. **Correct.**

(Gentile Deposition, Pl. Reply Ex. 1 p.70).

As Gentile testified, and as further described in Plaintiffs' Reply Brief, the buys and sells of 800 shares reflected above are client transactions with Mintbroker, which were not executed "on the street," *and are not included in Plaintiffs' computations*. The total of 500 shares purchased through Interactive reflect Mintbroker's "hedge" of the client transaction, *which is correctly included in Plaintiffs' computations*.

Plaintiffs submit that Defendants should not be allowed to introduce even more conflicting "evidence" at this stage of the case.

Respectfully Submitted,

*s/ Miriam Tauber*

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Miriam Tauber, *Attorney for Plaintiffs*

cc: all counsel (via ECF)